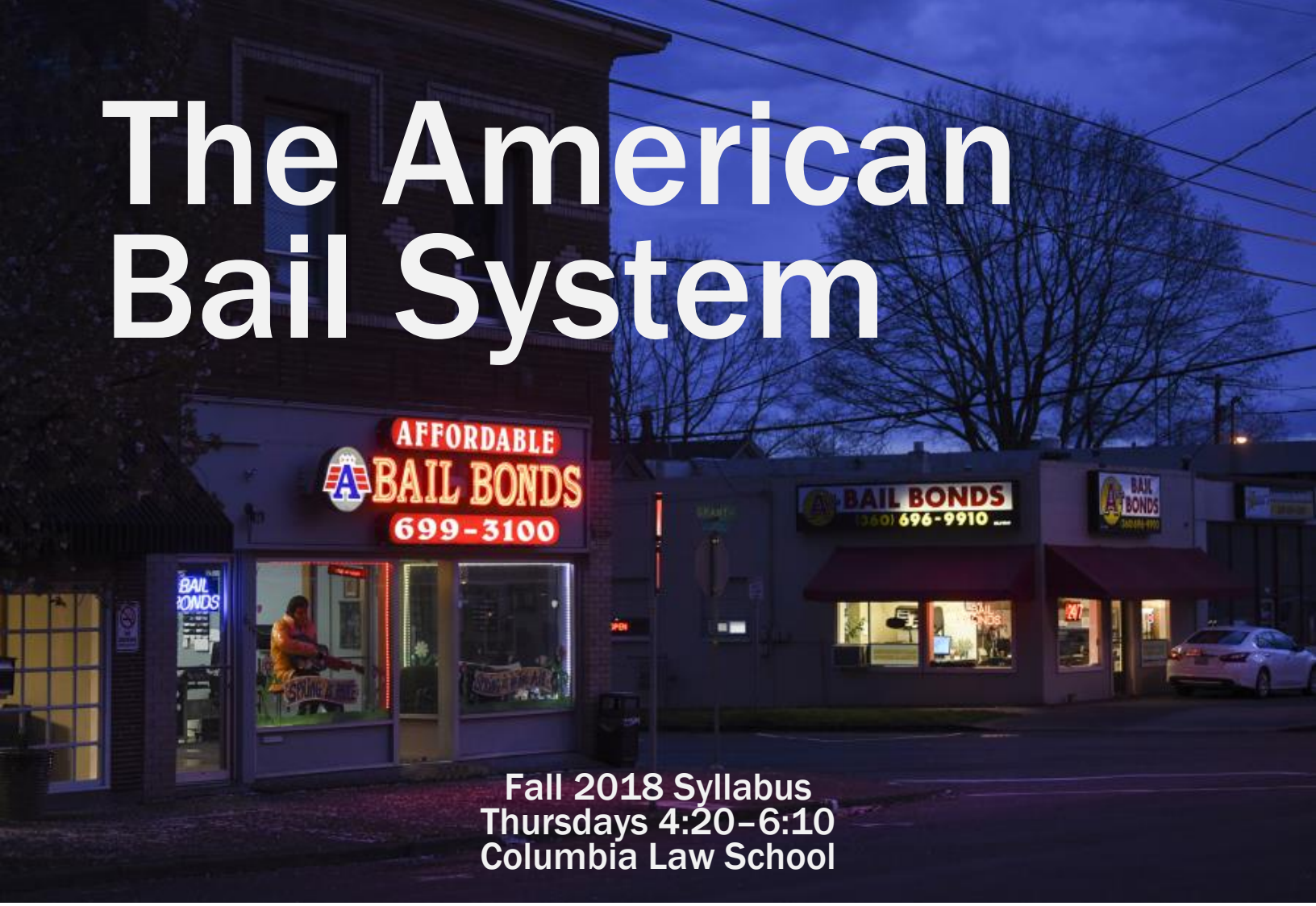
The American Bail System



Fall 2018 Syllabus
Thursdays 4:20–6:10
Columbia Law School

INSTRUCTOR Kellen Funk, Associate Professor of Law

ROOM TBA

OFFICE Room 901
Tue. 2:00 – 4:00, otherwise open door or by appointment

CREDIT 2 credit research seminar
substantial final paper

DESCRIPTION Three-quarters of the incarcerated population in America is awaiting trial, while commercial bail continues to be a thriving $2 billion-a-year industry. This seminar will examine in depth the United States' virtually unique reliance on commercial sureties as the leading alternative to detention before trial. We will examine the history of wealth-based detention, the socioeconomic and racial effects of pretrial release and detention, and the many levels at which bail and bond is regulated, from state and local municipal codes to Supreme Court doctrine. Above all, we will focus on bail as a system, considering how American federalism, legislation, law enforcement, commercial incentives, and charitable interventions combine to

create day-to-day practices churning defendants through the criminal courts. Students are invited to range widely in their research papers and draw on methods from legal history, sociology and economics, moral philosophy, or black-letter doctrine.

Like many aspects of pretrial procedure, bail has been largely overlooked in academic literature and in legal theory. But landmark reforms and high-profile litigations in the last half-decade have placed bail at the leading edge of access to justice, poverty law, and a host of constitutional issues relating to the rights of the criminally accused. Because until recently there has been a dearth of academic material on bail, this syllabus aims at comprehensiveness—reading all assignments should familiarize you with the universe of literature on bail, bond, and pretrial detention. As you hone in on a research topic, you should plan to read deeply the assignments that relate to your topic (and the sources they cite) and skim those that are further afield. Each week I'll outline which assignments are the more critical ones for the following week.

POLICIES Grades are based on class participation (20%) and a final paper (80%). The final paper of at least 20 pages should draw on course materials and original research on any topic related to bail. There is a lot of terrain to be explored, and work on bail will be eminently publishable. Class participation is broadly defined and includes office hours and email conversations.

All course materials will be posted to Courseweb or will be otherwise accessible online. You may bring a tablet-like device to class to consult electronic course materials; keypad stands and laptops (i.e., anything that doesn't lie flat on the table) will not be permitted.

Sept. 13 Bailment in People and Wealth-Based Detention in U.S. History

SUMMARY We begin with the history of American bail, such as it is. Bruce Mann's work focuses on imprisonment for (civil) debt, but it helpfully describes the procedural structure that remains in place for criminal bail, including crucial distinctions between secured and unsecured bonds. Mann does a masterful job of historical recovery on conditions at the New Gaol, the debtors prison in Manhattan. He will also lead us to our first great puzzle in the history of bail: why did civil imprisonment for debt become the leading target for nineteenth-century humane reform, while criminal imprisonment for debt remained undisturbed into the twenty-first century?

We then turn to the mobilization of history in legal argument, examining a brief by former Solicitor General Paul Clement on behalf of the American Bail Coalition, and one by the libertarian Cato Institute. Read closely the evidentiary claims of

these briefs. How determinate is the history as a guide to legal reasoning? Does history's value depend on an originalist commitment? Does it illuminate, or obscure, any particular constitutional text?

READINGS

Bruce Mann, *Republic of Debtors* (2010), Intro., Ch. 1, Ch. 3.

Brief for Amici Curiae American Bail Coalition, Georgia Association of Professional Bondsmen & Georgia's Sheriffs' Association in Support of Defendant-Appellant and Reversal of Preliminary Injunction, *Walker v. City of Calhoun*, 2016 WL 3452938 (11th Cir. 2016).

Brief for Amici Curiae the Cato Institute in Support of Plaintiff-Appellee and Affirmance of Preliminary Injunction, *Walker v. City of Calhoun*, 2016 WL 4364152 (11th Cir. 2016).

Suggested:

Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (Working Paper, Nat'l Conf. on Bail & Crim. Justice, May 1964).

John-Michael Seibler & Jason Snead, *The History of Cash Bail: Legal Memorandum*, THE HERITAGE FOUNDATION (Aug. 25, 2017).

Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, Pretrial Justice Institute (Sept. 2010).

Sept. 20 Bailors and Bounty Hunters

SUMMARY

Although Anglo-American bail regimes have relied on a surety system literally since time immemorial, *commercial* sureties—those who stand surety because they are tied to a bailee by payment rather than kinship—have a much more recent history. Most common law jurisdictions (and indeed, the entire civilian world) have consistently outlawed commercial surety systems. The first commercial sureties were authorized in the United States in 1898.

In this class we will examine the world of the bondsman—a world constructed largely of state licensing and regulation. We will first look at the triangle formed by the bondsman, the state, and bond insurers. How has the rise of insurance conglomerates standing behind small bail bonds shops altered the legal and economic landscape of bail? (You've already seen one effect: Paul Clement's brief didn't pay for itself.) We will start in North Carolina, where the insurance lobby has had arguably the most success in extracting favorable regulation.

We then turn to the lived—if somewhat mythical—experience of bondsman exercising their powers granted by state law, as well as their struggles when the state strips those powers away (as New Jersey is currently attempting to do). We'll examine the legal apparatus that supports the creation of Dog the Bounty Hunter, a self-styled black-garbed special ops dragoon who is, by his family's account, a

representative figure of the American bondsman. Ironically, these bondsmen are running up against the same federal court barriers that often stymie litigation *against* the money bail system.

READINGS

Bail Bondsmen and Runners, N.C. GEN. STAT. ANN., Art. 71. (skim)

Joe Killian, *Veteran NC Judges: State's Bail System is a "Scam," "Immoral," and in Need of "Massive Change,"* N.C. POL'Y WATCH, Apr. 4, 2018.

DOG THE BOUNTY HUNTER, *Do Unto Others* (Season 3, Episode 2, aired Apr. 4, 2006).

Lisa W. Foderaro, *New Jersey Alters Its Bail System and Upends Legal Landscape*, N.Y. TIMES, Feb. 6, 2017.

Complaint, *Holland v. Rosen*, Civil No. 17-4317 (D.N.J. June 14, 2017), *pre. inj. denied*, Sep. 21, 2017, *appeal pending*.

Brent Johnson, *"Dog the Bounty Hunter" Sues Chris Christie*, NJ.COM, July 31, 2017.

Suggested:

Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES, Mar. 31, 2018.

Complaint, *Rodgers v. Christie*, Civil No. 17-5556 (D.N.J. July 31, 2017).

Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES (May/June 2014).

Sept. 27 Bailees

SUMMARY

This week we turn from bailors to examine the experiences of bailees, those who are actually released from pretrial detention on bond. We start an argument about bailees' rights to monitoring. On the one hand, the growth of public pretrial services programs may represent dramatic progress in the reform of money bail—especially contrasted to the abusive practices of private bondsmen as detailed in the *Egana* litigation. But as you read, think about what problems these reforms may be introducing. Is pretrial monitoring best thought of as a *right* or as another kind of surveilled *detention*? (Recall the complaint in *Rosen* last week.) If supervision is always weighed as a lesser evil than outright detention, what's to prevent systemic oversupervision? On this point we'll consider evidence from the Bronx Bail Fund, which has been enormously successful at appearance rates despite conscientiously minimal supervision.

READINGS

Samuel Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1118 (2014).

First Amended Complaint, *Egana v. Blair's Bail Bonds*, Civil No. 17-5899 (E.D.La. Sep. 12, 2017).

National Sheriffs' Association Resolution, June 18, 2012.

Alan Feuer, *Bronx Charity Founder Wants to Pay Bail for Poor Defendants Nationwide*, N.Y. TIMES, Nov. 13, 2017.
Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 58 (2017).

Suggested:
Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277 (2014).
Kelly Hernández, *Access to Freedom: Caged LA*, MILLION DOLLAR HOODS REP. (2017).
Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes*, LAURA & JOHN ARNOLD FOUNDATION, Nov. 2013.
Sarah Phillips, *National Survey of Community Bail Funds*, DECARCERATION INITIATIVE, WASH. U. ST. LOUIS (April 2017).

Oct. 4. Detainees

SUMMARY From bailees—those released on bond—we turn to detainees—those unable to make bond. We start with the case of Sandra Bland (well worth reading up on if you weren't aware of the case as it was unfolding in 2015) to remind ourselves of the very high and very personal stakes of pretrial detention for failure to pay bail. The bulk of our reading is much more impersonal—but important. There has been an explosion in sociological literature in the past two years documenting the effects of pretrial detention on case outcomes, future criminal activity, and quality of life for criminal defendants and their dependents. These studies are becoming key evidence in legislative hearings and litigation against secured money bail systems. You're welcome to read them all, particularly if you have a background in statistics or sociology, but you are required to read only one in depth. Pay close attention and be prepared to discuss the methodology of these studies. One can't conduct a truly randomized experiment on a prison population (that would be an incredible violation of equal protection!), so how have these authors thought their way around that problem? Can any of them really make a strong causal claim about the effects of pretrial detention? How should that shape the course of reform?

READINGS Margaret Talbot, *Watching Sandra Bland*, NEW YORKER, July 29, 2015.
U.S. Dep't of Justice, U.S. Att'y for S.D.N.Y., *Report on the New York City Dep't of Corr. Jails on Rikers Island* (Aug. 4, 2014).

One of:
Paul S. Heaton, Sandra G. Mayson & Megan T. Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017).
Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. OF LEG. STUDIES 471 (2016).

Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (Working Paper, Univ. of Pa., Nov. 2016).
Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018).

Suggested:
Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463 (2004).
Jennifer Gonnerman, *Before the Law*, NEW YORKER, Oct. 6, 2014.

Oct. 11 Bail Schedules & Hearings

SUMMARY Bob Bone once observed in the *Columbia Law Review* that "[e]ach generation of procedure reformers, it seems, diagnoses the malady and proposes a cure only to have the succeeding generation's diagnosis treat the cure as a cause of the malady." We will see that cycle this week as we consider bail schedules and hearings, by far the dominant apparatus for making bail determinations in the majority of American jurisdictions. Bail schedules were at one time the leading edge of progressive reform, promising to discipline wildly variant (and racially discriminatory) bail settings that had been left to judicial discretion. A formalized hearing to determine probable cause and set bail arose as one of the last great criminal due process rights to be established despite the retrenchment of the Burger Court. So we will ask why—culturally, legally, economically—have bail schedules and hearings become the new malady?

Our study will land us squarely in Harris County, Texas, home to the City of Houston, the nation's third largest jail, and one of the signal litigation victories challenging money bail. We will review recordings of misdemeanor bail hearings entered into evidence in the federal litigation. As you watch, think about how you would remedy any problems that you see.

One possible solution is to appoint counsel at these bail hearings. We will end by considering the literature and the case law debating whether bail hearings should count as "critical stage" triggering the Sixth Amendment right to counsel. What arguments have persuaded courts one way or the other on the question? Given the sociological literature we've reviewed the past couple weeks, are those the most persuasive arguments?

READINGS *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc).
Gerstein v. Pugh, 420 U.S. 103 (1975).

Harris County Bail Hearing Videos, Plaintiffs' Exhibit 3.I., Preliminary Injunction Hearing, *ODonnell v. Harris Cty., Tex.*, Civil No. 16-1414 (S.D. Tex. Mar. 2017).

Meagan Flynn, *For Decades, Harris County's Bail System Trapped the Poor. Is that Finally Changing?*, HOUSTON PRESS, June 27, 2017.

Rules of Court, Harris County Criminal Courts at Law, *amended Aug. 12, 2016*, at 15.

Rules of Court, Harris County Criminal Courts at Law, *amended Dec. 17, 2017*, at 16.

Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUSTICE 23 (2016).

Suggested:

Ditch v. Grace, 479 F.3d 249 (3d Cir. 2007).

Gonzelez v. Comm'r of Corr., 68 A.3d 624 (Conn. 2013).

Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010).

State v. Fann, 571 A.2d 1023 (N.J. Super. L. 1990).

Douglas L. Colbert, Ray Paternoster & Shawn D. Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002).

Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. __ (2018).

Oct. 18 Risk Assessments

SUMMARY We now turn to the new leading edge of progressive reform, the adoption of algorithm-based risk assessments designed to guide and "de-bias" judicial decisionmaking. We will read from the Laura & John Arnold Foundation, the non-profit leader in developing and promoting risk-assessment tools. We then look at a set of algorithm-skeptic pieces (not all specifically related to bail) and consider whether they provide valuable warnings for the bail context.

Our key question for this week arises from the discussion last week: is this cure destined to become the new malady? If not, what will help risk assessment tools achieve their aim—a legal change? A cultural one?

READINGS

Timothy Schnacke, *The Third Generation of Bail Reform*, in Nat'l Ctr. for State Courts, Fines, FEES, AND BAIL PRACTICES: CHALLENGES AND OPPORTUNITIES (2017): 8–13.

Public Safety Assessment: Risk Factors & Formula, LAURA & JOHN ARNOLD FOUNDATION (2016).

Nathan Fennell & Meredith Prescott, *Risk, Not Resources: Improving the Pretrial Release Process in Texas* (White Paper, LBJ School of Public Affairs, UT Austin, June 2016).

Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018).
Chelsea Barabas et al., *Interventions over Predictions: Reframing the Ethical Debate for Actuarial Risk Assessment*, 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH 1 (2018).

Suggested:
Bernard Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (2007), Pt. II.
Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671 (2016).
Jessica M. Eaglin, *Constructing Recidivism Risk*, 60 EMORY L.J. 59 (2017).
John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. __ (2018).
Eric Westervelt, *Did A Bail Reform Algorithm Contribute to This San Francisco Man's Murder,* NPR: ALL THINGS CONSIDERED (Aug. 18, 2017).

Oct. 25 Due Process & Equal Protection

SUMMARY This week begins a series of classes dedicated to the doctrinal structure of the American bail system. We'll use our academic luxury to approach the issues in the reverse order as a court would look at them, by starting with substance and gradually working towards procedure. So what, substantively, does the Constitution proscribe about money bail? Would a "wealth-based detention system" be unconstitutional? What facts on the ground do you need to know to answer the question as a matter of law?

Constitutional challenges to money bail have found three apparently equally viable routes: equal protection, substantive due process, and procedural due process. We will review the major precedents in these areas as well as legal arguments applying the precedents specifically to money bail. Think back to the Harris County hearing videos or the abusive bailor practices we've seen. Our key question now is, what remedy becomes available under each of these doctrinal approaches? Does that make one approach more attractive—pleading requirements aside—or is it better, as the *Bearden* Court would have it, to try to conflate these approaches into a hybrid doctrine uniquely suited for wealth-based detention?

READINGS *Williams v. Illinois*, 399 U.S. 235 (1970).
Bearden v. Georgia, 461 U.S. 660 (1983).
United States v. Salerno, 481 U.S. 739 (1987).
Lopez-Valenzuela v. Arpaio, 770 F.3d 772 (9th Cir. 2014) (en banc).

Brief for Amici Curiae U.S. Department of Justice in Support of Plaintiff-Appellee and Affirmance of Preliminary Injunction, *Walker v. City of Calhoun*, (11th Cir. 2016).

Brief for Amici Curiae American Bar Association in Support of Plaintiff-Appellee and Affirmance of Preliminary Injunction, *Walker v. City of Calhoun*, 2016 WL 5846629 (11th Cir. 2016).

In re Humphrey, No. A152056, 2018 WL 550512 (Cal. Ct. App. Jan. 25, 2018).

Suggested:

Tate v. Short, 401 U.S. 395 (1971).

Turner v. Rogers, 564 U.S. 431 (2011).

United States v. McConnell, 842 F.2d 105 (5th Cir. 1988).

United States v. Jessup, 757 F.2d 378 (1st Cir. 1985).

United States v. Mantecon-Zayas, 949 F.2d 548 (1st Cir. 1991).

Nov. 1 Race & Class

SUMMARY So far we have thought about constitutional doctrines related to wealth-based detention. This week we will explore the confluence of race and class, first by looking at sociological literature demonstrating how indigent incarceration highly correlates with the confinement of black and brown bodies. But we remain in the midst of our doctrinal study, so we want to ask: Is there a route to turn this literature into a legal argument? If the Reconstruction Amendments and the original § 1983 meant anything, they surely stood for the proposition that (especially southern) jurisdictions could not jail black bodies on a mere accusation and evade federal court review. Why then has the desultory case law on *poverty* but not *racial* discrimination become the vehicle for attacking money bail?

Again, we will return to the question of remedy, looking at one imagined option for money bail based on poverty case law. What remedies might one imagine based on the racial critique?

READINGS David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions* (Nat'l Bureau of Econ. Research, Working Paper No. 23421, April 2018).

Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 LEGISLATION & PUB. POL'Y 919 (2013).

Brief for Amici Curiae NAACP Legal Defense and Educational Fund in Support of Plaintiffs' Motion for Preliminary Injunction, *ODonnell v. Harris Cty., Tex.*, Civil No. 16-1414, ECF No. 265 (S.D. Tex. 2017).

Larry Schwartztol, *The Role of Courts in Eliminating the Racial Impact of Criminal Justice Debt*, in Nat'l Ctr. for State Courts, Fines, FEES, AND BAIL PRACTICES: CHALLENGES AND OPPORTUNITIES (2017): 14–19.

Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—and Some Pathways for Change*, 112 NW. U. L. REV. __ (2018).
Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017).

Nov. 8 Federalism I: Federal vs. State

SUMMARY So far we've largely been reading federal case law. But recall *Humphrey* was handed down by the California Supreme Court. So first—to put the question positively—what possibilities for bail reform open up when we consider the state courts, as bail is almost entirely a creature of the states? We'll consider both high court rulings (New Mexico) as well as judge-made court rules (Maryland) that may track with the constitutional arguments we've been discussing but also derive authority from state constitutions, local legislation, and extra-constitutional arguments.

But then we have to recall Harris County. What happens when state courts accede in or ignore problems with money bail? The fact that bail is a creature of state law then raises significant problems for federal court review in our federated system. We'll probe one of those problems that particularly stalks the Second Circuit: abstention.

READINGS *State v. Brown*, 338 P.3d 1276 (N.M. 2014).
Court of Appeals of Maryland, Rules Order, Feb. 17, 2017. (*skim*)
Wallace v. Kern, 520 F.2d 520 (2d Cir. 1975) (often known as *Wallace III*).
United States Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* (Mar. 4, 2015): 47–62. ("*Ferguson Report*").
Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. __ (2018).

Suggested:
State v. Pratt, 166 A.3d 2017 (Vt. 2017).
Stack v. Boyle, 342 U.S. 1 (1951).
Bail Reform Act of 1966, 80 Stat. 214 (1966).
Jennings v. Rodriguez, __ U.S. __ (2018).

Nov. 15 Federalism II: State v. Locality

SUMMARY Bail is a creature of state law, but states in turn delegate the regulation of bail to smaller, more local units (whether boards, counties, or municipalities) or to particular branches (administrative commissions, courts, local legislatures, or some combination). The multiplicitous and layered authorities states use to

regulate bail present particular problems for reform. Whom to lobby—or whom to sue—depends largely on the local array of regulators in any given jurisdiction.

We will consider these particular problems this week through the lens of federal court intervention. We'll start by reviewing the major case law on municipal liability under Section 1983—how does one figure out whether a policy is promulgated by the state, locality, or individual officer? How does immunity for particular actors—such as judges—interact with this level-of-authority issue? We will then look at a couple recent cases that foundered on one or another of these rocks, and consider how one might analyze these questions in relation to Harris County.

READINGS

42 U.S.C. § 1983.
McMillian v. Monroe Cty., Ala., 520 U.S. 781 (1997).
Monell v. Dep't of Social Services, 436 U.S. 658 (1978).
Supreme Court of Virginia v. Consumers Union of U.S., Inc., 446 U.S. 719 (1980).

Rules of Court, Harris County Criminal Courts at Law, *amended Dec. 17, 2017*.
HOUSE BILL 3011, Proposed Pretrial Release Reform Act, Texas Legislature, Mar. 8, 2017.

Harris v. City of Austin, Civil No. 15-956, 2016 WL 1070863 (W.D. Tex., Mar. 16, 2016).
Woods v. City of Michigan City, Ind., 940 F.2d 275 (7th Cir. 1991).
Cain v. City of New Orleans, Civil No. 15-4479, 2016 WL 2849478 (E.D. La. May 13, 2016).

Nov. 29 Strategic Litigation

SUMMARY

This week provides something of a capstone for our studies. We follow a remarkable series of litigations by Civil Rights Corps, a nonprofit litigation startup out of Washington, D.C. Pay close attention to the dates and internal citations in the following materials. Look back at *Harris v. City of Austin* and *Cain v. City of New Orleans* from last week and compare the dates and the counsel of record. Can you see the strategic pathway forming through the progress of these cases?

For our major reading we'll examine one of two opinions that manages to thread the procedural needle and make a substantive ruling about a money bail system. You can either read Chief Judge Rosenthal's ruling, or, if you're weary of Harris County, Judge Simandle's handling of the New Jersey *anti*-reform litigation. These opinions are considerably lengthy owing to their detailed recitation of facts. What do you think the significance of these robust fact findings will be on appeal?

READINGS

Statement of Interest of the United States, *Varden v. City of Clanton, Ala.*, Civil No. 15-34 (M.D. Ala. Feb. 13, 2015).

Final Judgment, *Jones v. City of Clanton, Ala.*, Civil No. 15-34 (M.D. Ala. Sept. 14, 2015).

Order of Final Declaratory Relief, *Pierce v. City of Velda City, Mo.*, Civil No. 15-570 (E.D. Mo. June 3, 2015).

Either:

Findings of Fact and Conclusions of Law, *ODonnell v. Harris Cty., Tex.*, Civil No. 16-1414 (S.D. Tex. Apr. 28, 2016), *appeal pending*.

Opinion Denying Preliminary Injunction, *Holland v. Rosen*, Civil No. 17-4317 (D.N.J. Sep. 21, 2017), *appeal pending*.

Suggested:

Civil Rights Groups Challenge Discriminatory, Wealth-Based Bail Practices in Alabama County, ACLU, May 18, 2017.

Ryan J. Reilly, *Mark Zuckerberg and Priscilla Chan Are Funding the Fight to End Money Bail*, HUFFINGTON POST, Oct. 11, 2017.

Google and Koch Industries Team Up To Deny Access to Constitutional Right to Bail, AM. BAIL COALITION, May 8, 2018.

Memorandum in Opposition of the Motion to Dismiss, *Buffin v. City and Cty. of San Francisco*, Civil No. 15-4959 (N.D. Cal. July 12, 2016).

Dec. 6 What Comes Next

SUMMARY

Throughout the term we've seen many potential cures for the maladies of pretrial detention result in unexpected and often detrimental consequences. So far, both bail schedules and discretionary risk assessments, individual rights to bail and state rights to order preventive detention, commercial bondsmen and public pretrial services have all continued to recapitulate a system of widespread pretrial incarceration little different from the studies of the eighteenth century we read in the opening week.

But last week ended with news releases on major funding initiatives against money bail, including the decisions of Google and Facebook to no longer run advertising for bailbonding agents. Do these changes represent a cultural shift on bail? Where might that shift take us? Whether secured money bail is reformed or abolished, what takes its place? If mass incarceration is not simply going to continue on in new forms, what are the resources—cultural, legal, economic—that are going to break the cycle?

More concretely, we look again at the major litigations in Harris County and San Francisco. Where do legislative activities and circuit court reviews seem to be

trending? Note that the Trump Justice Department is apparently backing away from the Obama-era policy on procedural due process in bail determinations, as evidenced by the Department's latest brief in the *Walker* litigation.

READINGS

Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017).

Moving Beyond Money: A Primer on Bail Reform, Harvard Law School Criminal Justice Policy Program (October 2016): 14–31.

Brief for Amici Curiae Texas Baptists Christian Life Commission, Texas Catholic Conference of Bishops, and Clergy and Religious Leaders in Support of Plaintiffs-Appellees, *ODonnell v. Harris Cty., Tex.*, 2017 WL 3579412 (5th Cir. 2017).

ODonnell v. Harris Cty., Tex., 882 F.3d 528 (5th Cir. 2018).

Pretrial Detention Reform—Recommendations to the Chief Justice, CAL. PRETRIAL DETENTION REFORM WORKGROUP (Oct. 2017).

Jeff Adachi, *Don't Let Judges Hijack California Bail Reform*, THE SACRAMENTO BEE, Nov. 27, 2017.

Brief for Amici Curiae U.S. Department of Justice in Support of Neither Party, *Walker v. City of Calhoun*, 2016 WL 3452938 (11th Cir. 2017).

Caleb Foote, *The Coming Constitutional Crisis in Bail*, pts. I & II, 113 U. PENN. L. REV. 959, 1125 (1965).